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No. 195

In the Supreme Court of the United States

OCTOBER TERM, 1951

JAMES RUTKIN, PETITIONER,

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Summary of argument	12
Argument:	
Introductory	17
I. The court below correctly held that the sum of $250,000 obtained by the petitioner as a result of harassing demands and repeated threats on Reinfeld's life constitutes taxable income within the meaning of section 22(a) of the Internal Revenue Code	18
A. Illegality of receipts is not a bar to taxability	20
B. Petitioner's receipt of the money under an asserted claim that it was his together with his complete control over, and economic benefit from, it made it clearly his income under the landmark decisions of this Court	22
C. Petitioner asserted a claim to the $250,000 adverse to the whole world; accordingly, he claimed of right within the meaning of *North American Oil* v. *Burnet* and *United States* v. *Lewis*	24
D. Petitioner's interpretation of *Commissioner* v. *Wilcox* if literally and generally applied would immunize from income taxation most, if not all, illegal income, a result neither required by, nor anticipated by, that decision	28
E. There are compelling practical considerations present here but absent in *Commissioner* v. *Wilcox* which require the conclusion that petitioner had income	35
II. There was no prejudicial error in the charge to the jury with respect to any question raised by the petition for certiorari	41
A. The failure to charge petitioner's request to charge No. 29 was not prejudicial	41
B. The trial court submitted to the jury, under proper instructions, all contested questions of fact necessary to determine whether petitioner had income	49

Argument—Continued Page

III. Petitioner's points six to nine, inclusive, were not presented in the petition and are accordingly not open to him now, but in any event they are without merit 51

Conclusion 53

CITATIONS

Cases:

Abrams v. *United States*, 250 U.S. 616 18

Akers v. *Scofield*, 167 F. 2d 718, certiorari denied, 335 U.S. 823 ..... 20, 28, 31, 34

Anderson v. *Bowers*, 170 F. 2d 676, certiorari denied, 337 U.S. 918 28

Barker v. *Magruder*, 95 F. 2d 122 ..... 28, 32

Beaver v. *Taylor*, 93 U.S. 46 48

Bond v. *O'Gara*, 177 Mass. 139 27

Boston Consol. Gas Co. v. *Commissioner*, 128 F. 2d 473 28

Bowden-Gazzam Co. v. *Hogan*, 22 Wash. 2d 27 26

Burnet v. *Guggenheim*, 288 U.S. 280 23

Burnet v. *Leininger*, 285 U.S. 136 23

Burnet v. *Wells*, 289 U.S. 670 23

Caldwell v. *Commissioner*, 135 F. 2d 488 31

Chadick v. *United States*, 77 F. 2d 961, certiorari denied, 296 U.S. 609 32

Clay Sewer Pipe Ass'n v. *Commissioner*, 139 F. 2d 130 28

Cohen v. *Commissioner*, 176 F. 2d 394 31

Commissioner v. *Alamitos Land Co.*, 112 F. 2d 648, certiorari denied, 311 U.S. 679 28

Commissioner v. *Heininger*, 320 U.S. 467 40

Commissioner v. *Wilcox*, 327 U.S. 404 ..... 14, 15, 18, 19, 20, 22, 24, 28, 29, 30, 35, 37, 38

Connecticut Ry. Co. v. *Palmer*, 305 U.S. 493 52

Corliss v. *Bowers*, 281 U.S. 376 23

Currier v. *United States*, 166 F. 2d 346, affirming, 70 F. Supp. 219 ..... 20, 31

Cutcliffe v. *Commissioner*, decided July 31, 1946 ..... 20, 33

Cutliffe v. *Commissioner*, 163 F. 2d 891 ..... 20, 31, 33

Droge v. *Commissioner*, 35 B.T.A. 829 32

Fear v. *Barwise*, 93 Kan. 131 27

Fleischer v. *Commissioner*, 158 F. 2d 42 28

General Pictures Co. v. *Electric Co.*, 304 U.S. 175 52

Glasser v. *United States*, 315 U.S. 60 18

Gleckman v. *United States*, 80 F. 2d 394, certiorari denied, 297 U.S. 709 41

Graham v. *Green*, 2 K. B. 37 (1925) 21

Griffin v. *Smith*, 101 F. 2d 348, certiorari denied, 308 U.S. 561 28

Cases—Continued

	Page
Griffiths v. *Commissioner*, 308 U. S. 355	23
Haberkorn v. *United States*, 173 F. 2d 587	28
Helvering v. *Clifford*, 309 U.S. 331	22, 23
Helvering v. *Horst*, 311 U.S. 112	23
Higgins v. *Smith*, 308 U.S. 473	23
Humphreys v. *Commissioner*, 125 F. 2d 340, certiorari denied, 317 U.S. 637	32
Huntington v. *Commissioner*, 35 B.T.A. 835	32
Johnson v. *Manhattan Ry. Co.*, 289 U.S. 479	52
Johnson v. *United States*, 318 U.S. 189	21, 31, 44
Lilly v. *Commissioner*, 188 F. 2d 269, certiorari granted October 8, 1951	40
Lincoln v. *Claflin*, 7 Wall. 132	48
Lucas v. *Earl*, 281 U.S. 111	23
Lyeth v. *Hoey*, 305 U.S. 188	34
McKenna v. *Commissioner*, 1 B.T.A. 326	32
Mortensen v. *United States*, 322 U.S. 369	18
National City Bank v. *Helvering*, 98 F. 2d 93	32
Nat. Licorice Co. v. *Labor Board*, 309 U.S. 350	52
North American Oil v. *Burnet*, 286 U.S. 417	25, 27, 28, 29
Palmer v. *Hoffman*, 318 U.S. 109	48
Patterson v. *Anderson*, 20 F. Supp. 799	32
Pennsylvania R. R. Co. v. *Minds*, 250 U.S. 368	48
Petit v. *Commissioner*, 10 T. C. 1253	20, 32
Phelps v. *Mayer*, 15 How. 160	48
Putnam, Estate of, v. *Commissioner*, 324 U.S. 393	35
Rickard v. *Commissioner*, 15 B.T.A. 316	32
Rupley v. *Fraser*, 182 Minn. 311	26
St. Regis Paper Co. v. *Higgins*, 157 F. 2d 884	28
Sanford, Estate of, v. *Commissioner*, 308 U.S. 39	23
Saunders v. *Commissioner*, 101 F. 2d 407	28
Smith v. *Minister of Finance*, 2 Dom. L. R. 1137 (1925), reversed (1927) A. C. 193	21
Southern v. *A. B.*, 1 K. B. 713 (1933)	21
Spies v. *United States*, 317 U.S. 492	41
Steinberg v. *United States*, 14 F. 2d 564	21, 32, 40
Textile Mills Corp. v. *Commissioner*, 314 U.S. 326	40
Tinkoff v. *United States*, 86 F. 2d 868, certiorari denied, 301 U.S. 689	41
Tyler v. *United States*, 281 U.S. 497	23
United States v. *Chapman*, 168 F. 2d 997	20, 31
United States v. *Commerford*, 64 F. 2d 28	32
United States v. *Jacobs*, 306 U.S. 363	23
United States v. *Lewis*, 340 U.S. 590, rehearing denied, 341 U.S. 923	25, 28, 37, 39
United States v. *Miro*, 60 F. 2d 58	41
United States v. *Pelzer*, 312 U.S. 399	34

Cases—Continued

	Page
United States v. *Rosenblum*, 176 F. 2d 321, certiorari denied, 338 U.S. 893	20, 31
United States v. *Schenck*, 126 F. 2d 702	41
United States v. *Stafoff*, 260 U.S. 477	21
United States v. *Stilson*, 254 Fed. 120, affirmed, 250 U.S. 583	44
United States v. *Sullivan*, 274 U.S. 259	21, 31
United States v. *Wampler*, 5 F. Supp. 796	21, 32
Voyer v. *Commissioner*, 4 B.T.A. 1192	32
Weiner v. *Commissioner*, 10 B.T.A. 905	32

Statutes:

9 Alabama Code of 1940, Sec. 44	33
Georgia Code, Ann., Sec. 26-6501	33
Internal Revenue Code:	
Sec. 22 (26 U.S.C. 1946 ed., Sec. 22)	2, 13, 15, 22, 37
Sec. 23 (26 U.S.C. 1946 ed., Sec. 23)	34, 40
Sec. 145 (26 U.S.C. 1946 ed., Sec. 145)	2, 17, 18
New Jersey Statutes Ann:	
Sec. 2:57-5	33
Sec. 2:57-9	33
Sec. 2:127-4	33
Revenue Act of 1934, c. 277, 48 Stat. 680, Sec. 23	34
Revenue Act of 1951, Public Law 183, 82d Cong., 1st Sess., Sec. 471	40

Miscellaneous:

7 Ala. Lawyer 332 (1946)	19, 33
American Law Institute, Federal Income Tax Statute (Tenative Draft No. 4, April 24, 1951, p. 148)	19
34 Cal. L. Rev. 449 (1946)	19
46 Col. L. Rev. 677 (1946)	19
Federal Rules of Civil Procedure, Rule 51	48
Federal Rules of Criminal Procedure, Rule 30	16, 46
9 Ga. Bar J. 107 (1946)	19
Housel & Walser, Defending and Prosecuting Federal Criminal Cases (2d ed., 1946):	
Sec. 512	48, 49
Sec. 519	48, 49
H. Rep. No. 704, 73d Cong., 2d Sess., p. 22 (1939-1 Cum. Bull. (Part 2) 554, 570)	34
H. Rep. No. 586, 82nd Cong., 1st Sess., p. 55	34
22 Ind. L. J. 99 (1946)	19

Miscellaneous—Continued

	Page
Magill, Taxable Income (Revised ed., 1945), p. 377	27
44 Mich. L. Rev. 885 (1946)	19
30 Minn. L. Rev. 308 (1946)	19
5 Moore's Federal Practice (2d ed., 1951), par. 51.04	49
18 Okla. Bar Assn. J. 1752 (1947)	19, 35
Sedgwick & Wait, Trial of Title to Land (2d ed.), Sec. 756	27
S. Rep. No. 781, 82nd Cong., 1st Sess., p. 113	34
20 So. Cal. L. Rev. 113 (1946)	19
Rules of the Supreme Court, Rule 38	52
25 Texas L. Rev. 693 (1947)	19
4 Tiffany, Real Property (3d ed., 1939)	26, 27
58 Yale L. J. 955, 962-963 (1946)	19

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OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Court of Appeals (R. 991-1008) is reported at 189 F. 2d 431.

JURISDICTION

The judgment of the Court of Appeals was entered on May 23, 1951. (R. 1009.) A petition for rehearing was denied on June 19, 1951. (R. 1017.) The petition for a writ of certiorari was filed on

July 18, 1951, and was granted on October 8, 1951. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTIONS PRESENTED

1. Whether in the circumstances of this case, money which petitioner falsely claimed was his and was able to persuade another to pay him by means of harassing demands and repeated threats, constituted income under Section 22 (a) of the Internal Revenue Code.

2. If money so obtained is income whether the jury was properly charged.

STATUTE INVOLVED

Internal Revenue Code:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes * * * gains or profits and income derived from any source whatever. * * *

* * * * *

(26 U.S.C. 1946 ed., Sec. 22.)

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax,

and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with costs of prosecution.

* * * * *

(26 U.S.C. 1946 ed., Sec. 145.)

STATEMENT

The petitioner was indicted for willfully attempting to defeat and evade a large part of his income and victory tax for the calendar year 1943. The charge was that he did so by filing a false and fraudulent return in which he stated his net income for that calendar year was the sum of $18,966.64 and that the amount of income and victory tax owing was the sum of $6,843.93, whereas the corrected net income was in fact $268,622.04 upon which he owed an income and victory tax of $222,408.32. (R. 5-6.) On the basis of the jury's verdict of guilty (R. 3), the petitioner was fined $10,000 and sentenced to prison for four years. The judgment of conviction was affirmed by the Court of Appeals for the Third Circuit, one judge dissenting. (R. 1009.)

The sum of $250,000 involved in this case and charged by the Government to be the income of the petitioner in 1943, upon which no tax was paid,

was admittedly transferred by Reinfeld, the principal Government witness, to the petitioner. The Government charged that the payment was made as a result of extortion. The petitioner contended that it was in final settlement of his interest in the Browne Vintners Company, a corporation organized after the repeal of prohibition. It was conceded that if petitioner's version were the correct one, he would be entitled to an acquittal because the capital gains tax had already been paid on moneys transferred in payment for interests in the Browne Vintners Company. (R. 24, 991-992.)

The following is an outline of the evidence favorable to the Government which the jury was entitled to believe:

The history, organization, and liquidation of the Browne Vintners Company.—The witness, Reinfeld, testified that in 1926, during the prohibition period, he and five other men were engaged in what he called a "High Seas venture". This was a bootlegging operation which, as described, consisted in putting "a boat out there beyond the 12-mile limit and different people come and buy whiskey". The enterprise continued until 1932. In 1929, the petitioner came into the group. According to Reinfeld the petitioner did not contribute any money, but "just wanted to be a partner and we took him in". Reinfeld explained that the petitioner was taken in without any monetary contribution because otherwise "we were afraid

that we will get some interference and trouble". (R. 12-18.)

Reinfeld testified that the petitioner was to receive three per cent of the profits. A few months after the inception of the "High Seas venture", one of the members of the organization "said he was going to quit because he had some arguments with Rutkin and he is afraid". (R. 18.) The person did quit and gave his three per cent share to the petitioner. (R. 18-19.)

The "High Seas venture" was liquidated early in 1933. There was an accounting "as to what each partner had". Each member was informed of his interest. The petitioner's percentage interest at that time was six per cent, despite the fact that he had not paid any money into the enterprise. The petitioner was not entitled to any distribution upon the liquidation of the "High Seas venture" because he was then overdrawn to the extent of $35,000, and this fact was brought to his attention. He was given a memorandum showing that he was overdrawn to the extent of $35,000. (R. 22-24, 196, 992.)

In October, 1933, the members of the original "High Seas venture", with the exception of the petitioner, organized the Browne Vintners Company. (R. 24.) The petitioner did not own any of the Browne Vintners stock in his own name or through nominees. He did not have any interest

in any of the assets of the corporation. (R. 24-26, 120.)

Reinfeld testified that in 1936, the petitioner, asserting that he had a six per cent interest in the old company and a continuing six per cent interest in Browne Vintners, demanded $60,000. Reinfeld's reply was: "Jim, you haven't got any money". Nevertheless, Reinfeld gave the petitioner the $60,000 because he liked him and because the petitioner had convinced him that "he is going to be a success". At that time the petitioner signed a document which, among other things, stated that he sold, assigned and transferred to Reinfeld all of his "right, title and interest in and to six per cent of the issued and outstanding shares of capital stock, preferred and common, as of October 1, 1936, of Browne Vintners Co., Inc., a New York corporation, which represents any and all of such shares of capital stock in the said Browne Vintners Co., Inc., that I am entitled to". As to this document, Reinfeld testified that the petitioner delivered it to him saying that "he was paid out in full according to what claims he was making, and I decided to recognize the claims and pay him out in full". (R. 32-33, 289, 290-291.)

At the time the aforementioned document was executed, Browne Vintners was worth approximately $700,000, six per cent of which would be approximately $42,000. The amount of $60,000 which Reinfeld gave the petitioner was more than

the six per cent which the petitioner claimed as his interest in the corporation. (R. 289.)

In 1939, Reinfeld obtained a job for the petitioner with Browne Vintners at $15,000 a year. The petitioner remained in this job from six to eight months. During that period the petitioner became involved in a liquor violation in Boston and asked Reinfeld to lend him $2,500. Reinfeld paid a lawyer named Kessler $2,500 to help petitioner. The petitioner lost his job because of the Boston incident. (R. 36-37, 993.)

Reinfeld and the petitioner had no discussions about Browne Vintners except that occasionally the petitioner asked Reinfeld how business was. The petitioner came to the Browne Vintners offices three or four times during some months and sometimes not for six months. (R. 108.) The petitioner testified that he did not have an office in Browne Vintners but that he used all of the offices indiscriminately. (R. 807.) He stated that he was not an officer of the corporation, did not attend any of the stockholders or directors meetings, gave no orders to any of the officers of the company, and they took no orders from him. He did not know whether his name appeared on the records of the company as a stockholder. (R. 808.)

Joseph Newman, who was connected with Browne Vintners from 1933 to December, 1940, and who was its president for two years, testified that he saw the petitioner at the plant only a couple

of times; that the petitioner did not have an office; did not represent the company in any of its affairs and did not attend stockholders or directors meetings and did not establish any policies or programs. (R. 898-900.) Edward T. Browne, first president of the company, testified that he did not know the petitioner and that he never saw him at the Browne Vintners premises during the time that he was president; that the petitioner did not participate in the business affairs of the company. (R. 903.) John H. Owen, former president and vice-president of Browne Vintners, later an official with McKesson & Robbins, stated that he saw the petitioner at the Browne Vintners offices four or five times; that the petitioner had nothing to do with the business affairs, never participated in policy formation, never did any work at the New York office, and never attended any of the meetings of the stockholders or directors. (R. 908-909.) Mortimer Lowell testified that he did advertising work for Browne Vintners from its inception to the time that it was sold to Seagrams; that he was at the office frequently and never less than once a week and sometimes three or four times a week; that he saw the petitioner there several times and heard his name mentioned, but that the petitioner never gave any orders with respect to advertising and did not participate in any way. (R. 907.)

In 1940, after extensive negotiations, Browne Vintners was sold to Seagrams for $7,500,000.

Debts amounting to $8,000,000 were assumed by the purchaser. (R. 27.) Except for certain moneys withheld for debts and contingencies (R. 128), there was a distribution of the proceeds of the sale. The petitioner did not have any interest in the company at that time. He was not an actual or beneficial owner of any stock. (R. 28.) The sale of the company was not discussed with him. (R. 131.) A list of real stockholders and nominees was compiled by the accountants. (R. 28.) The capital gains tax on all the stock was paid by the record owners. (R. 129.)

The threats.—In 1941, Reinfeld gave the petitioner $10,000 on the latter's representations that he wished to purchase a tavern. The petitioner returned in a week or ten days for more money, at which time Reinfeld accused him of losing the $10,000 at the racetrack. "And that was our first trouble", Reinfeld stated. There was an argument and Reinfeld told the petitioner that he was not going to give him another cent; that he was finished. (R. 38-39.)

Reinfeld testified that in late October or early November, 1942, the petitioner came to his office at Browne Vintners and started off by saying to him, "Where is my money? * * * You all done well, you all made a lot of money, what about me?" Reinfeld answered, "What do you want from me now that you threw all your money away? I haven't got your money". The petitioner insisted

that Reinfeld give him $100,000 to pay his debts. There was an argument and Reinfeld said that the petitioner threatened him. Asked to tell about this in detail Reinfeld said, "Well, he had his hand in his pocket (indicating) and said that he would kill me if I didn't give him the money in three days". Then, said Reinfeld, the petitioner "run out". Reinfeld stated that because of the incident he cancelled some appointment that he had and that he "was disgusted and discouraged with business and everything". (R. 40-42.)

A couple of weeks later the petitioner again came in to Reinfeld's office, pushed the latter's secretary aside, and told Reinfeld "that if I don't give him that money that he is going to kill me". At that time the petitioner's demand went up to $150,000. Reinfeld was then asked, "What happened to you about this time, if anything?" He answered, "Well, I took sick". (R. 42-43.)

A week or two later the petitioner came to Reinfeld's New York hotel room and saw him there. Reinfeld said he did not remember what the petitioner said but that it was "nothing bad". As the petitioner was leaving, Reinfeld followed him to the door, and then, Reinfeld states that Rutkin "opened the door and started to walk out. He turned around and put a gun on me" saying "you get well and get me that money". At that time his figure was $200,000. He said, "Get me $200,000 or I will kill you". Sometime later, no specific

date being fixed, at a time when Reinfeld stated he was just getting well, the petitioner telephoned him, told him that he was sick and started to apologize. The petitioner sounded over the telephone as though he were crying. Reinfeld said that he felt bad about this and agreed to go to the petitioner's hotel to see him. He did go to the hotel. The petitioner told him that he had not slept since he had been up to see Reinfeld and that he must have been crazy or something. Reinfeld stated that he felt very sorry for the petitioner and said, "Let's forget the whole thing". The petitioner told him that he owed $4,000 for room rent and some other things and asked him for money. Reinfeld went out, obtained $5,000 and brought it back to him. Then, stated Reinfeld, "he told me if I could only give him another $5,000, how much he will think of me and all that. So I gave him another $5,000 at about 5 or 6 o'clock that afternoon". (R. 43-44.)

Within a month, at the home of his brother-in-law, Reinfeld again saw the petitioner. (R. 50.) There the petitioner stated that he was going to kill Reinfeld and Reinfeld's family if he did not get his money. (R. 51, 230-231.)

Later the same day, when certain negotiations between Reinfeld and others had been completed, Kessler, an attorney who had arbitrated these other matters that day, asked Reinfeld, "How about Mr. Rutkin?" Reinfeld asked: "Well, what is his claim?" Kessler replied: "Well, you been

friends, you slept with him for a long time; now go in in the other room and give him some money and get through with it". (R. 47, 223-224.) Reinfeld and the petitioner went into another room. The petitioner had first wanted half a million dollars and finally said he would take $250,000. Reinfeld agreed to pay this amount because "I wanted to get rid of him anyway and get this off my mind, because I carried it long enough. I was a sick man. So I agreed". (R. 47, 225-226, 994-995.)

Several weeks after the meetings just described but before the actual payment of the $250,000 here involved, the petitioner telephoned the office of the Jos. A. Reinfeld Company. Lou Holtz, Reinfeld's brother-in-law, answered and recognized the petitioner's voice. The petitioner said something about the fact that Reinfeld was sick and that if anything happened to him he would hold Reinfeld's family responsible for the money which he claimed; that if he did not get it he would kill the whole family. (R. 231-232.)

Two hundred and fifty thousand dollars was actually paid over to the petitioner on May 11, 1943, in exchange for a general release from him in favor of Reinfeld, the latter's brothers, Browne Vintners Company, Inc., and others. (R. 52-53, 269.)

SUMMARY OF ARGUMENT

I

The $250,000 petitioner obtained from the witness Reinfeld as a result of threats and harassing

demands was his income within the meaning of Section 22(a), Internal Revenue Code. Although the manner of the taking unquestionably constituted the criminal offense of extortion under New Jersey law, it is settled by controlling decisions of this Court and required by the legislative history and the all inclusive language of Section 22(a) that illegality is no bar to taxability.

Petitioner had income because he had complete control over and economic benefit from the money—attributes of ownership equally or more substantial than those which justified the tax in the landmark decisions of this Court interpreting Section 22(a). Those decisions make plain beyond any question that petitioner's contention that he had no title—even if he is correct in this on the facts of this case—is quite immaterial. The tax, as this Court has said time and again, is predicated on the practical substance of the transaction, the economic benefits and command over the property taxed—the actual benefit for which the tax is exacted—rather than on technical refinements of title.

Nor is it possible to conclude that the money was not income because petitioner might be required to restore its equivalent. Where a taxpayer has received money under circumstances where his right to keep it is being contested or may be contested, the rule is firmly entrenched that it is nevertheless his income if (1) he claims of right and (2) there is no restriction on its disposition. The

phrase "claim of right" was adopted by this Court, and consistently applied—not to distinguish honest from dishonest claims—but to distinguish receipts claimed by the taxpayer as his from money or property which he receives as a mere borrower, conduit, or stakeholder.

This Court's decision in *Commissioner* v. *Wilcox*, 327 U.S. 404, virtually petitioner's sole reliance here, does not support him. Although the Court there held that embezzled funds were not income, it did so because it thought that an embezzler was like a borrower. Accepting this premise, although it has been widely criticized, there can be no question that Wilcox did not claim of right, i.e. adversely to the owner—the historical and pragmatic meaning of the concept—and accordingly he had no income. Here there was no "bare receipt" of the money as the Court said was true in *Wilcox*, but an open and adverse claim to it not only as against the whole world except the real owner, but as against him too.

Although there is language in *Wilcox* which if read as broadly as petitioner would like, would necessitate the conclusion that petitioner did not have income, it would equally necessitate the conclusion that most, if not all, illegal income is not taxable, contrary to overwhelming judicial authority to say nothing of the Congressional intention and understanding. It is inconceivable that the Court, without mention, would have intended such a radical departure from so many fundamentals of tax law, request to charge No. 29) is without foundation.

Moreover, whether illegal income is taxable, if at all, would turn, under petitioner's view of *Wilcox*, on varying provisions of state law having no logical relevance to the criteria of Section 22(a) as repeatedly interpreted by this Court in other cases. To make state law determinative would be contrary to the well entrenched and salutary rule of construction that it will be presumed that Congress intended a uniform application of the revenue laws throughout the several states and therefore state law may control only when the Internal Revenue Code by express language or necessary implication makes its operation dependent on state law.

Finally, it is well known that the revenue laws have been an important sanction in the fight against crime. Whatever may be said against this use of the revenue laws, there can be no question either as a matter of discerning a specific Congressional purpose or applying "public policy", the revenue laws should not be interpreted in a manner discriminating in favor of the criminal element. Yet such would be the effect of the approval of petitioner's position.

II

Petitioner's contention that prejudicial error resulted from the court's failure to charge the jury that if petitioner used threats to obtain money owing to him as a result of his interest in Browne Vintners stock he should be acquitted (petitioner's

Petitioner wrongly asserts that the court's charge, as given, could be interpreted to mean that petitioner should be found guilty if he used threats to collect his own money. The court's charge made perfectly plain that petitioner could be convicted only if he in fact had no interest in Browne Vintners stock and used threats to collect the money. Any possible ambiguity is completely dispelled when the charge is read in the light of the evidence adduced at the trial and of the parties' contentions.

In any event, although petitioner had ample opportunity to do so, he took no exception to the court's refusal to make the charge in question and, accordingly, the court had no opportunity to amend its charge as it might have done had the question been raised. Under these circumstances, Rule 30, Federal Rules of Criminal Procedure, is by its terms expressly applicable and prevents assignment of error on this point.

Contrary to petitioner's contention the jury was properly instructed on all elements relating to whether petitioner had income. The only factual controversy was whether petitioner had a legal right to the money or whether he was an extortioner. If the latter, as the jury concluded, petitioner had income. No dispute existed between the parties that petitioner claimed adversely to Reinfeld and, of course, the world; accordingly, there was no question for the jury as to whether such a claim was asserted.

III

The other questions which petitioner urges in his brief were not raised in the petition for a writ of certiorari and are accordingly not now before the Court. In any event, they are without merit.

ARGUMENT

Introductory

The petitioner was indicted, tried and convicted pursuant to Section 145(b) of the Internal Revenue Code, *supra*, pp. 2-3, for wilfully attempting to defeat and evade a large part of his income and victory tax for 1943. The charge was that he did so by filing a false and fraudulent return in which he understated his net income by $250,000. (R. 5-6.)

The petitioner admits having received $250,000 in 1943 which he did not return as his income. His defense was that the $250,000 was paid to him by Joseph Reinfeld in payment of his stock interest in Browne Vintners Company which was liquidated by the sale of its assets in 1940 to Seagrams. The Government conceded that if petitioner in fact had a stock interest in Browne Vintners for which the $250,000 was paid, he should be acquitted because the tax had already been paid on the Browne Vintners' liquidating dividend.[1] But petitioner's

[1] The record discloses that much of the stock in Browne-Vintners was held by nominees. The nominees reported the income, paid the tax and transmitted the difference to the real owners. (R 205.) Although on a strict construction of the

version of the facts was controverted by the Government's charge that petitioner had never owned any interest in Browne Vintners and that the $250,000 was paid to him solely as a result of harassing demands and repeated threats against Reinfeld and members of his family.

The petition for certiorari raised no question, nor could there be any—as the Statement, *supra*, indicates—that there was not substantial competent evidence in support of the Government's view. See *Abrams* v. *United States*, 250 U.S. 616, 619; *Glasser* v. *United States*, 315 U.S. 60; *Mortensen* v. *United States*, 322 U.S. 369. The questions for decision here are rather whether (1) on the facts most favorable to the Government's theory, did the petitioner have taxable income and (2) if so, was the jury properly charged so that its verdict reflected that theory.

I

The Court Below Correctly Held that the Sum of $250,000 Obtained by the Petitioner as a Result of Harassing Demands and Repeated Threats on Reinfeld's Life Constitutes Taxable Income Within the Meaning of Section 22(a) of the Internal Revenue Code

This Court held in *Commissioner* v. *Wilcox*, 327 U.S. 404, that embezzled money was not income.

Internal Revenue Code, the proceeds of the sale perhaps should have been reported by the beneficial owners, the Government's concession was motivated by the consideration that the failure to report the proceeds would hardly have been the basis for predicating a charge of wilful attempt to evade and defeat the tax within the meaning of Section 145(b).

Although we think now, as we did then, that a better result would have been to treat embezzled funds as income,[2] we do not ask, nor is it necessary, that

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[2] The decision in *Commissioner* v. *Wilcox, supra,* has been widely criticized. There has been almost complete agreement that in any event it should be limited to its facts. The American Law Institute, Federal Income Tax Statute (Tentative Draft No. 4, April 24, 1951, p. 148), proposes an amendment to the Code expressly designed to change the result in *Wilcox*. The proposal is that gross income shall include (p. 13) "Proceeds of bribery, blackmail, embezzlement, theft, or other illegal acts." The Law Institute's commentary on this proposal is as follows (p. 148):

> Subsection (b) (20) changes present law as respects the proceeds from an embezzlement, making such proceeds income contrary to the Supreme Court decision in *Comm'r* v. *Wilcox*, 327 U.S. 404 (1946). The lower courts are having trouble with the decision when faced with other illegal activities, as swindling (*Akers v. Scofield*, 167 F. 2d 718 (5th Cir. 1948)), or diversion of corporate funds by the principal stockholder-officer (*Currier v. United States*, 166 F. 2d 346 (1st Cir. 1948), and *United States v. Chapman*, 168 F. 2d 997 (7th Cir. 1948)). The result, if the doctrine continues unmodified, is apt to be a series of decisions difficult of reconciliation, especially since the lower courts are attempting to restrict the *Wilcox* decision. It is believed desirable to tax such proceeds, with a subsequent deduction to the embezzler if he repays the funds, rather than to have embezzlement (and perhaps a few other activities) end up with a treatment different from that accorded most illegal acts. * * *

The Law Review and Bar Journal commentaries have been almost universally critical of not only the reasoning in *Wilcox* but of the result. 7 Ala. Law. 332 (1946); 34 Cal. L. Rev. 449 (1946); 46 Col. L. Rev. 677 (1946); 44 Mich. L. Rev. 885 (1946); 18 Okla. Bar Assn. J. 1752 (1947); 20 So. Cal. L. Rev. 113 (1946); 25 Texas L. Rev. 693 (1947); 58 Yale L. J. 955, 962-963 (1946), especially footnotes 38 and 39. Those commentaries that agreed with the result generally did so on the basis of the peculiar facts and predicted that the case would not be extended to other types of illegal income. 9 Ga. Bar J. 107 (1946); 22 Ind. L. J. 99 (1946); 30 Minn. L. Rev. 308 (1946). The lower courts have in fact limited *Wilcox* to its own facts. See footnote 3, *infra*.

Wilcox be repudiated in order to conclude here that petitioner's extorted money was income. The only problem which *Wilcox* presents in the present context arises not at all from the *Wilcox* result but only from some language in the opinion which, if applied as petitioner urges (Br. 29-35), would not only be inconsistent with the most basic concepts of taxable income, as enunciated in decisions long antedating *Wilcox* and with which the *Wilcox* result harmonizes, but would serve to exempt most, if not all, illegal gains from taxation. The Court, in *Wilcox*, obviously intended no such radical departure from tax fundamentals.

A. *Illegality of receipts is not a bar to taxability*

This Court did not by its decision in *Wilcox* intend to preclude treating illegal receipts as such as income.[3] On the contrary it stated: "That the taxpayer's motive may have been reprehensible or the mode of receipt illegal has no bearing upon the application of § 22(a)." 327 U.S. 404, 408. This express disavowal of any intention to immunize from taxation gain otherwise taxable merely be-

[3] The lower courts without exception have so understood *Wilcox*. *United States* v. *Rosenblum*, 176 F. 2d 321 (C.A. 7th), certiorari denied, 338 U.S. 893; *United States* v. *Chapman*, 168 F. 2d 997 (C.A. 7th); *Akers* v. *Scofield*, 167 F. 2d 718 (C.A. 5th), certiorari denied, 335 U.S. 823; *Currier* v. *United States*, 166 F. 2d 346 (C.A. 1st), affirming 70 F. Supp. 219 (D. Mass.); *Cutcliffe* v. *Commissioner*, 163 F. 2d 891 (C.A. 5th), affirming the Tax Court's memorandum decision of July 31, 1946 (1946 P-H T.C. Memorandum Decisions, par. 46,184); *Petit* v. *Commissioner*, 10 T.C. 1253.

cause it resulted from illegal activity was required by *United States* v. *Sullivan*, 274 U.S. 259, and *Johnson* v. *United States*, 318 U.S. 189. The conclusion is epitomized by Mr. Justice Holmes' statement in *United States* v. *Stafoff*, 260 U.S. 477, 480, involving an excise tax that "Of course Congress may tax what it also forbids."[4]

Sullivan affirmed the decision of the Court of Appeals that gains from illicit liquor traffic were taxable under the Revenue Act of 1921, c. 136, 42 Stat. 227. The Court relied on the broad language of Section 213(a) of the 1921 Act, in all material respects identical with Section 22(a) of the Internal Revenue Code, *supra*, p. 2, and pointed out that the Revenue Act of 1916 had omitted the limiting adjective "lawful" contained in the 1913 Act. It concluded (p. 263) that, "We see no reason to doubt the interpretation of the Act," adding, "or any reason why the fact that a business is unlawful should exempt it from paying the taxes that if lawful it would have to pay."

It cannot be doubted, then, that Section 22(a), as interpreted by this Court, encompasses the $250,000 petitioner received notwithstanding the

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[4] The largely philosophical difficulty which other courts had experienced in subjecting to income tax the fruits of activity prohibited by law (see, e.g., *Steinberg* v. *United States*, 14 F. 2d 564 (C.A. 2d); *United States* v. *Wampler*, 5 F. Supp. 796, 797 (D. Md.); *Smith* v. *Minister of Finance*, 2 Dom. L. R. 1137 (1925), reversed (1927) A.C. 193; *Graham* v. *Green*, 2 K.B. 37 (1925); *Southern* v. *A. B.*, 1 K.B. 713 (1933)), seems never to have been shared by this Court.

illegality of the transaction if, but for the illegality, it would be income.

B. *Petitioner's receipt of the money under an asserted claim that it was his together with his complete control over, and economic benefit from, it made it clearly his income under the landmark decisions of this Court.*

There is not the slightest question that Reinfeld knowingly and intentionally paid the $250,000 to the petitioner. There is no question either that petitioner received it as his, with no intention of repaying it to Reinfeld. Neither of these significant circumstances was true of the taking in *Wilcox*. It is equally the fact that petitioner at all times exercised complete dominion and control over the money and on the basis of every practical use to which money can be put, he had every attribute of full ownership. Since the "broad sweep * * * [of Section 22(a)] indicates the purpose of Congress to use the full measure of its taxing power" (*Helvering* v. *Clifford*, 309 U.S. 331, 334; *Commissioner* v. *Wilcox*, *supra*, p. 407), these most significant attributes of ownership are more than a sufficient basis on which to predicate the tax.

Petitioner's contention (Br. 33-35) that he did not have "title" is beside the point. Assuming that he did not, "title" has been repeatedly rejected as a limitation on the scope of Section 22(a). Taxation, as the Court has noted, is an "eminently

practical" matter. *Tyler* v. *United States*, 281 U.S. 497, 503; *United States* v. *Jacobs*, 306 U.S. 363, 370. The reach of the taxing Acts is to be determined by the practical substance of transactions, the location of economic benefits, and by the "actual command over the property taxed—the actual benefit for which the tax is paid," rather than by the technical refinements of title. *Corliss* v. *Bowers*, 281 U.S. 376, 378. *Lucas* v. *Earl*, 281 U.S. 111, 114-115; *Burnet* v. *Leininger*, 285 U.S. 136, 141-142; *Burnet* v. *Guggenheim*, 288 U.S. 280; *Burnet* v. *Wells*, 289 U.S. 670, 678; *Estate of Sanford* v. *Commissioner*, 308 U.S. 39; *Griffiths* v. *Commissioner*, 308 U.S. 355; *Higgins* v. *Smith*, 308 U.S. 473; *Helvering* v. *Clifford*, *supra*; *Helvering* v. *Horst*, 311 U.S. 112.

As a practical matter—as a matter of economic benefit and of power over the amount in question—petitioner had income under the landmark decisions of this Court, *supra*, defining the scope of Section 22(a). Nor can it be doubted that as a matter of "Common understanding and experience * * * the touchstones for the interpretation of the revenue laws" (*Helvering* v. *Horst*, *supra*, p. 118), petitioner also had income. It would be impossible for the man in the street to understand why petitioner's $250,000 was not as fully amenable to the income tax as money honestly earned.

C. *Petitioner asserted a claim to the $250,000 adverse to the whole world; accordingly, he claimed of right within the meaning of North American Oil* v. *Burnet and United States* v. *Lewis.*

Analysis of the *Wilcox* opinion, 327 U.S. 404, shows that the Court viewed the situation there as analogous to the receipt of a "loan or credit." (P. 408.) "The debtor-creditor relationship was definite and unconditional." (P. 409.) "* * * the bare receipt of property or money wholly belonging to another lacks the essential characteristics of a gain or profit within the meaning of §22 (a)." (P. 408.) Whether or not the analogy between Wilcox, the embezzler, and a debtor be deemed complete or accurate, it is plain enough that here there was no relationship even remotely akin to that of debtor and creditor. As we have already noted, the evidence was unequivocal that Reinfeld transferred the money intentionally and with no thought of subsequent repayment.[5] Petitioner, on the other hand, received the money as his and claimed it, not as in *Wilcox* "against all the world except the true owner" (p. 407), but as against Reinfeld too. This was not "the bare receipt of * * * money." (P. 408.)

[5] In the *Wilcox* case, it was stipulated that "The taking of said sum as aforesaid has never been condoned nor forgiven by the employer, and it always has and now does hold the taxpayer liable to restore the same." Record in No. 163, October Term, 1945, p. 18.

Borrowed funds are not income nor does a stakeholder have gain. Such receipts, like a return of capital, are never properly taxable. It was to distinguish these receipts from true income that the "claim of right" concept was adopted in *North American Oil* v. *Burnet*, 286 U.S. 417, 424, applied in *Wilcox* and recently reaffirmed in *United States* v. *Lewis*, 340 U.S. 590, rehearing denied, 341 U.S. 923.

In *North American* the Court stated (p. 424):

> If a taxpayer receives earnings under a claim of right and without restriction as to its disposition, he has received income which he is required to return, even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent.

The income in controversy arose from property which a receiver held impounded pending litigation between the United States and North American Oil Company as to the ownership of the property. Income earned from the property in 1916 was turned over to the company in 1917 upon entry of a final decree in the District Court dismissing the bill of the United States. The appellate phases of the litigation terminated favorably to North American in 1922. The question was whether the income should have been reported in 1916, 1917 or 1922. This Court held (p. 424) that the profits became income of North American in 1917 "when

it first became entitled to them and when it actually received them." In so doing, it rejected North American's contention that it was, in essence, a stakeholder, and that it might eventually have to return the money. The phrase, "claim of right," was applied to the income not in contradistinction of wrongful or specious claims—for no such question was involved—but to distinguish amounts received and claimed regardless of the rights of others, as against amounts received with recognition of the ownership of another—"the bare receipt of property or money wholly belonging to another" which, as already emphasized, was the Court's language to describe the embezzled funds in *Wilcox*, 327 U.S., at 408.

That this was the sense in which the phrase was used is confirmed by the fact that "claim of right" was unknown in tax decisions prior to *North American* although it had a well defined real property connotation. The "claim of right" which courts require to establish adverse possession in land is the objective manifestation of an intention to use property as one's own regardless of interests of others. See *Bowden-Gazzam Co.* v. *Hogan*, 22 Wash. 2d 27, 34-37, 154 P. 2d 285, 289-290; *Rupley* v. *Fraser*, 132 Minn. 311, 313, 156 N. W. 350, 351. "Right" and "title" were not thought to be synonymous. As pointed out in Tiffany, *Real Property* "* * * by claim of right or title, in connection with the doctrine of adverse possession, is meant merely 'an intention to appropriate and

hold the land as owner, and to the exclusion, rightfully or wrongfully, of every one else." 4 Tiffany, *Real Property* (3d ed., 1939), p. 444. See, also, Sedgwick & Wait, *Trial of Title to Land* (2d ed.), Sec. 756; *Bond* v. *O'Gara*, 177 Mass. 139, 58 N. E. 275; *Fear* v. *Barwise*, 93 Kan. 131, 143 Pac. 505. Tiffany makes plain that there is "general acceptance of the view" in the absence of express statutory requirement that "the statute will run regardless of whether the wrongful possession was taken under a bona fide claim of right." (P. 445.)

We think it plain that the Court not only borrowed the phrase itself from real property law but also used it in its real property sense. This use in *North American* of "claim of right," together with the further requirement that in order to have taxable income there be no restriction as to disposition regardless of the claim of others and regardless of an ultimate liability to restore its equivalent, appropriately distinguishes borrowed money from income.[6] The use of the claim of right phrase in *Wilcox*, to deal with the problem expressed in the opinion of not taxing funds which the Court believed so closely resembled a debt, was

[6] Distinguishing borrowed money from income, together with distinguishing income from capital has been the important concern of the courts in the application of Section 22(a). See Magill, Taxable Income (Revised ed., 1945), cited in *Wilcox* in another connection (p. 377):

> In these cases * * * the Court has been concerned with source in drawing the line between capital and income, not in distinguishing legal from illegal operations.

entirely in accord with the use of the phrase in *North American* and in the vast number of cases applying the concept.[7] Unless *Wilcox*—which as noted *supra* disavowed this purpose—has added the necessity of distinguishing between legal and illegal income, though explicitly disavowing any such intention, the claim of right phrase was never intended to be, and has never been, so employed.

D. *Petitioner's interpretation of Commissioner v. Wilcox if literally and generally applied, would immunize from income taxation most, if not all, illegal income, a result neither required by, nor anticipated by, that decision*

It is plain, then, that Wilcox, given the Court's hypothesis that embezzled funds were like borrowed funds (see *supra*, p. 24) did not claim of right within the meaning of *North American*. The difficulty with the opinion is not that it in any sense misapplied the concept to reach the result there

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[7] Representative cases in addition to *United States* v. *Lewis*, 340 U.S. 590, are the following: *Boston Consol. Gas Co.* v. *Commissioner*, 128 F. 2d 473 (C.A. 1st); *St. Regis Paper Co.* v. *Higgins*, 157 F. 2d 884 (C.A. 2d); *Clay Sewer Pipe Ass'n* v. *Commissioner*, 139 F. 2d 130 (C.A. 3d); *Anderson* v. *Bowers*, 170 F. 2d 676 (C.A. 4th), certiorari denied, 337 U.S. 918; *Akers* v. *Scofield*, 167 F. 2d 718 (C.A. 5th), certiorari denied, 335 U.S. 823; *Haberkorn* v. *United States*, 173 F. 2d 587 (C.A. 6th); *Griffin* v. *Smith*, 101 F. 2d 348 (C.A. 7th), certiorari denied, 308 U.S. 561; *Fleischer* v. *Commissioner*, 158 F. 2d 42 (C.A. 8th); *Commissioner* v. *Alamitos Land Co.*, 112 F. 2d 648 (C.A. 9th), certiorari denied, 311 U.S. 679; *Saunders* v. *Commissioner*, 101 F. 2d 407 (C.A. 10th); *Barker* v. *Magruder*, 95 F. 2d 122 (C.A. D.C.).

reached, but that in transplanting the doctrine from *North American*, the language of the earlier decision was unaccountably changed in a manner not serious in its context but which, as petitioner would apply it, would have the most drastic, and we are certain, unintended results.[8] *Wilcox* (p. 408) added the qualification to the phrase, "claim of right"—that it be "bona fide legal or equitable,"[9] which it erroneously credits to *North American* and a further requirement hitherto absent in the claim of right cases that there be absent (p. 408) "a definite, unconditional obligation to repay or return that which would otherwise constitute a gain." Assuming as we think plain, that some, if

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[8] It may be significant that despite Mr. Justice Burton's forceful disagreement with the *Wilcox* result expressed in his dissenting opinion (327 U.S., at pp. 410-416) no part of the disagreement was based on his understanding that the majority intended to cast any doubt on the taxability of other types of illegal income. On the contrary, his express understanding of the majority view was that extorted funds would still be taxable (p. 414):

> If he [Wilcox] had gained possession of the original funds by extortion, fraud or usurious practices, those gains would be taxable to him under the general language of §22(a). The majority opinion, however, holds that if he gained possession of the original funds by embezzlement then such gains are not to be taxed to him under that language. This reads into the section a sharp distinction between the embezzler and defrauder, exempting the former but not the latter. In the absence of an express declaration of such an intent by Congress, I believe that the courts are not justified in reading such a distinction into this section.

[9] The opinion is not entirely clear that a bona fide claim is in fact a requirement because it suggests later (327 U.S., pp. 408) that a "semblance of a bona fide claim of right" may be sufficient.

not most, illegal receipts are income, the qualifying phrase "bona fide or equitable" to the claim of right doctrine was peculiarly inappropriate for general application. It is a considerable strain on the plain meaning of "bona fide legal or equitable" to conclude that any wrongdoer so receives the gain from his illegal activity. And if, as petitioner contends (Br. 30), the requirement of *Wilcox* that there be absent a definite unconditional obligation to repay or return the sum in controversy assumes that no cause of action exists at the time of receipt through which the recipient of the money can be forced to repay, it is doubly plain that most illegal receipts are not income. If the *Wilcox* claim of right criteria, as interpreted by the petitioner here, and not the criteria of *North American Oil*, were intended to be applied in non-embezzlement situations, as petitioner urges, a vast number of the decided cases including most, if not all, of those involving illegal gain, in fact were repudiated *sub silentio* by *Wilcox*.[10]

The following situations—all involving income from illegal sources and in all of which courts have held the taxpayer had income—were those in which the taxpayer—as petitioner interprets those re-

[10] *Wilcox* not only did not purport to do so, but actually cited, apparently with approval, cases which could not have been decided as they were under the *Wilcox* dicta. See footnote 7, 327 U.S., p. 409. This confirms Justice Burton's understanding that the majority was distinguishing embezzled funds from extorted, fraudulently acquired or usurious receipts. 327 U.S., p. 414. See footnote 7, *supra*, p. 28.

quirements—either (1) did not have a bona fide legal or equitable claim to the money or (2) was under a definite unconditional obligation to repay or to return the money, or both: *Johnson* v. *United States*, 318 U.S. 189 (money paid to a political leader to "protect" against police interference in numbers game);[11] *United States* v. *Sullivan*, 274 U.S. 259 (illicit traffic in liquor); *Cohen* v. *Commissioner*, 176 F. 2d 394, 396 (C.A. 10th), (payments received for protection from state and county law enforcement in operation of illicit liquor and gambling establishment); *United States* v. *Rosenblum*, 176 F. 2d 321 (C.A. 7th), certiorari denied, 338 U.S. 893 (black market profits); *United States* v. *Chapman*, 168 F. 2d 997 (C.A. 7th) (black market overcharges withheld by corporate officer from corporation); *Akers* v. *Scofield*, 167 F. 2d 718 (C.A. 5th), certiorari denied, 335 U.S. 823 (swindling); *Currier* v. *United States*, 166 F. 2d 346 (C.A. 1st) (checks of corporation appropriated by principal stockholder); *Cutcliffe* v. *Commissioner*, 163 F. 2d 891 (C.A. 5th) (receipts from lottery); *Caldwell* v. *Commissioner*, 135 F. 2d 488 (C.A. 5th)

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[11] The *Johnson* decision of this Court is perhaps more noteworthy here for what it did not say than for what it did. The amenability of the wages of sin to the income tax had become so well entrenched that by the time the case was considered by the Court, it apparently did not even occur to counsel or the Court to question the taxability of such illicit gain. Yet it is plain that *Johnson* neither had a bona fide legal or equitable claim to the money which was paid to him in order that he would improperly influence and bribe law enforcement officials to be derelict in their duty.

(bribes); *Humphreys* v. *Commissioner*, 125 F. 2d 340 (C.A. 7th), certiorari denied, 317 U.S. 637 (protection payments to a racketeer and ransom paid to a kidnapper); *National City Bank* v. *Helvering*, 98 F. 2d 93 (C.A. 2d) (illicit profits by a corporate officer); *Barker* v. *Magruder*, 95 F. 2d 122 (C.A. D.C.) (usurious interest); *Chadick* v. *United States*, 77 F. 2d 961 (C.A. 5th), certiorari denied, 296 U.S. 609 (graft); *United States* v. *Commerford*, 64 F. 2d 28 (C.A. 2d) (bribes); *Steinberg* v. *United States*, 14 F. 2d 564 (C.A. 2d) (illicit traffic in liquor); *Patterson* v. *Anderson*, 20 F. Supp. 799 (S.D. N. Y.) (unlawful insurance policies); *United States* v. *Wampler*, 5 F. Supp. 796 (D. Md.) (monies of a client fraudulently misapplied by an attorney); *Petit* v. *Commissioner*, 10 T. C. 1253 (black market in sugar by means of forged ration stamps); *Droge* v. *Commissioner*, 35 B.T.A. 829 (lotteries); *Huntington* v. *Commissioner*, 35 B.T.A. 835 (lotteries); *Rickard* v. *Commissioner*, 15 B.T.A. 316 (illegal prize-fight pictures); *Weiner* v. *Commissioner*, 10 B.T.A. 905 (card playing); *Voyer* v. *Commissioner*, 4 B.T.A. 1192 (lotteries); *McKenna* v. *Commissioner*, 1 B.T.A. 326 (racetrack bookmaking).

The incongruity, indeed impossibility, of accepting petitioner's interpretation of the *Wilcox* language is illustrated by applying the suggested criteria to receipts from gambling, perhaps the most

widespread, and under our mores the most venial, type of illegal activity. In most states where gambling is illegal, we submit that the recipient has no more nor no less a bona fide legal or equitable claim of right to his winnings than has petitioner to the $250,000 he extorted from Reinfeld. Both types of transactions are contrary to law, and, while petitioner's crime is the more heinous,[12] there is no such thing as a little illegality. But whether we are correct in this view, there can be no question at all that in the large number of states that treat a gambling agreement as void and give the loser, an informer, or the state a cause of action to recover the lost money or property [13] the winner cannot be said to have received his winnings without "a definite, unconditional obligation to repay or return" them as petitioner would interpret the language quoted from *Wilcox*.

The result in cases involving gambling would, then, turn on the vicissitudes of state law not only contrary to the known intention and understanding of Congress that gambling proceeds are gross income within the meaning of Section 22(a) re-

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[12] Extortion is punishable in New Jersey as a high misdemeanor. New Jersey Statutes, Ann., Sec. 2:127-4.

[13] For example, New Jersey, where petitioner is resident (New Jersey Statutes, Ann., Secs. 2:57-9 and 2:57-5); Georgia (Georgia Code, Ann., Sec. 26-6501, discussed in *Cutcliffe* v. *Commissioner*, decided July 31, 1946 (1946 P-H T.C. Memorandum Decisions, par. 46,184, affirmed on this point, 163 F. 2d 891 (C.A. 5th)); Alabama (9 Alabama Code of 1940, Sec. 44, and see 7 Ala. Law. 332, 334 (1946)).

gardless of state law provisions as to illegality,[14] but contrary to the firmly entrenched and sound rule of construction of this Court that "Congress establishes its own criteria and the state law may control only when the federal taxing act by express language or necessary implication makes its operation dependent upon state law."[15] *Lyeth* v. *Hoey*, 305 U.S. 188, 194; *United States* v. *Pelzer*, 312 U.S.

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[14] Section 23(h), Internal Revenue Code, provides that "Losses from wagering transactions shall be allowed only to the extent of the gains from such transactions." It is evident that the section is not meaningful if wagering transactions do not give rise to gain. The provision originated as Section 23(g) of the Revenue Act of 1934, c. 277, 48 Stat. 680. The House Report on the Committee Bill, H. Rep. No. 704, 73d Cong., 2d Sess., p. 22 (1939-1 Cum. Bull. (Part 2) 554, 570) states:

> Section 23(g). Wagering losses: Existing law does not limit the deduction of losses from gambling transactions where such transactions are legal. Under the interpretation of the courts, illegal gambling losses can only be taken to the extent of the gains on such transactions. A similar limitation on losses from legalized gambling is provided for in the bill. Under the present law many taxpayers take deductions for gambling losses but fail to report gambling gains. This limitation will force taxpayers to report their gambling gains if they desire to deduct their gambling losses.

And see H. Rep. No. 586, 82nd Cong., 1st Sess., p. 55, relating to the Revenue Act of 1951 where the Committee on Ways and Means, in connection with the now enacted excise tax on wagering (see footnote 19, *infra*, p. 39), stated: "Since its inception, the Federal income tax has applied without distinction to income from illegal as well as legal sources, and it has never been generally supposed that such application carried with it any implied authorization to carry on illegal activities." See also S. Rep. No. 781, 82nd Cong., 1st Sess., p. 113.

[15] *Akers* v. *Scofield*, 167 F. 2d 718 (C.A. 5th), certiorari denied, 335 U.S. 823, presents another example of the properly irrelevant inquiries into state law that will become the test of the taxability of illegal receipts unless the *Wilcox* opinion is

399, 402; *Estate of Putnam* v. *Commissioner*, 324 U.S. 393, 394.

E. *There are compelling practical considerations present here but absent in Commissioner v. Wilcox which require the conclusion that petitioner had income.*

Since, as already stated, this Court has repeatedly observed that taxation is a practical affair, additional observations concerning the practical implications of petitioner's position should be made.

1. In *Commissioner* v. *Wilcox*, 327 U.S. 404, 410, the Court concluded its discussion of the income question by stating, "Sanctioning a tax under the circumstances before us would serve only to give the United States an unjustified preference as to part of the money which rightfully and completely belongs to the taxpayer's employer." Although we think that Mr. Justice Burton's dissenting observation (p. 414) on the immateriality of the possible unfairness to the wronged person as a factor in deciding whether the wrongdoer had income is

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clarified. There the court held that under Texas law a swindler receives voidable title, hence he has income. But the difference between larceny by fraud in which title generally does not pass and larceny by trick in which it usually does (in Texas, swindling) is a fine one. See 18 Okla. Bar Assn. J. 1752, 1753 (1947). It is difficult indeed to see why taxability should be predicated on such distinctions in this field when the court has repeatedly refused to do so in the field of legal receipts.

in logic unanswerable,[16] since the Court has adopted this reasoning, it should be pointed out that no such hardship can arise here because, as already noted, Reinfeld has never claimed the money nor is it legally possible for him to do so now. And while it is true that the existence of income must be judged by the situation existing in the year when it is said to arise, that is no answer here because a fundamental distinction on the practical level between embezzled funds taken without the owner's knowledge, and extorted funds taken with his knowledge and with his consent elicited through threats, is that the former usually will, as in fact occurred in *Wilcox*, seek restitution, but the latter, as in fact occurred here, usually will not. The same fear of bodily injury and desire for peace of mind that motivate the Reinfelds to satisfy extortioners' demands will usually deter them from pursuing their legal remedies. Similarly, fear of exposure or reprisals and difficulty of proof will effectively deter those who make payments to racketeers or lose at games of chance.

Whatever the merits, then, of taking into consideration the possibility of the Government's lien

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[16] Mr. Justice Burton stated:

> A point has been made of the fact that the Government's tax lien upon property of the embezzler would have priority over the claim of the victim of the embezzlement to recover from such property the losses which the victim suffered by the embezzlement. This priority of the tax lien is hardly an adequate argument to eliminate the tax itself. At most it is an argument for Congress to modify the tax lien in favor of the victim.

defeating in part the chance of the victim of embezzlement to recoup his loss, it has no practical significance here. In any event, neither this Court nor any other to our knowledge has made this inquiry in any other than an embezzlement situation although it is difficult to see why the situation presented by *United States* v. *Lewis*, 340 U.S. 590, should not also follow *Wilcox* if there were any question of the taxpayer's inability to repay the employer and also pay the tax. Indeed there are numerous situations where the Government's tax lien defeats the recovery of honest claims against insolvent taxpayers even in situations where the taxable income directly arose from goods or services furnished by the ultimately disappointed creditor. These are questions of policy that can only be resolved by Congress. We see no room in the language, purpose, or prior interpretation of Section 22(a) to predicate its coverage on the basis of possible hardship to third parties. Certainly there is none in cases such as this where there is no hardship.

2. The criterion of the *Wilcox* opinion, discussed *supra*, that to have income there must be absent a definite, unconditional obligation to repay was undoubtedly motivated by the consideration that Wilcox was being held accountable to repay the embezzled sums and would probably in fact be required to repay to the extent of his financial ability. We have already shown that in *North American*

Oil the Court had no occasion to, and did not, impose such a requirement and that, in a practical sense, such requirement would be in derogation of the claim of right principle as outlined in that case and thereafter consistently applied. See *supra*, pp. 28-33. We have shown, too, that such a requirement would result in exempting many, if not most, illegal gains from taxation contrary to all the decisions. *Ibid.* But it was one thing to justify the *Wilcox* result on that basis since Wilcox was in fact being held accountable; it would be quite another, and as a practical matter unjustifiable, to conclude that petitioner had no income because there existed a theoretical cause of action by Reinfeld which in fact was not resorted to and as a matter of probability would not be resorted to. In any event no action for replevin or right to summary restoration by the magistrate existed here as it did in *Wilcox*, 327 U.S., p. 409. Indeed, the enormous record here, containing conflicting testimony covering twenty-five years of intricate business relationships, the formal release given Reinfeld by petitioner (Ex. D-8, R. 966a), and the evident perjury—which on the basis of the jury's verdict must have been committed by petitioner and in his behalf [17]—would make Reinfeld's task not only difficult and arduous but

[17] The trial court's charge referred to the evident perjury as follows (R. 925):

> That somebody lied and committed perjury is perfectly patent because contradictory stories have been told, and you must say where the truth lies; and the problem of determining that truth is solely and peculiarly yours.

uncertain in result. His remedy was anything but summary.[18]

Regardless, then, of the criminality involved, Reinfeld in fact had nothing but an uncertain civil remedy. On this aspect of the case, it is much more like *United States* v. *Lewis, supra,* with the perhaps immaterial but nevertheless real difference that Lewis in fact, under the state court's judgment, returned the income in controversy to his employer while petitioner was never even asked to make restitution. Thus, if income taxation is a practical matter, it is not possible to square petitioner's position with the result in *Lewis.* Lewis, an honest but mistaken man, received money and was compelled to return it. Petitioner, a dishonest man, received money and was not. On the practical level, if Lewis had income, as it was correctly held he had, petitioner, *a fortiori,* had income.

3. There is a third practical consideration already suggested that merits express attention.

The literal application of the *Wilcox* dicta, as urged by the petitioner will, as argued, *supra,* immunize from income tax many, if not most, receipts from illicit enterprise. Congress and the courts, now and in the past, have sought to discourage criminality by imposing additional sanctions on certain illegal enterprises in the form of special

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[18] If Reinfeld's cause of action were not now barred by limitations, his right might be easier to enforce in the light of the verdict in this case. But that is, of course, irrelevant.

or additional taxes[19] and the courts, on the basis of public policy, have denied income tax deductions to wrong-doers.[20] Regardless of the merits of these sanctions and this policy, we think there is no room for argument that it is contrary to the known Congressional policy and to public policy generally to discriminate in favor of the recipients of gain from illegal activity in the interpretation of the income tax provisions. There is no question here of taxing petitioner merely because the receipts were outside the law; the tax sought to be imposed is the same tax that would be due if he had honestly earned the same amount. To the extent that the dishonest are able to escape tax, the honest in the last analysis must pay the more. But equally important, to the extent that the criminal element is permitted to escape taxation, there is an additional incentive to criminality. Thus, whatever may be said in defense of discriminatory taxation to discourage criminal activity, there is certainly no defense for a result which makes the criminal the favorite of the tax law.

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[19] See, e.g., Internal Revenue Code, Section 23(h) (limitation on wagering losses); Section 471 of the Revenue Act of 1951, Public Law 183, 82d Cong., 1st Sess., adding Chapter 27A to the Internal Revenue Code (ten percent excise tax on wagering); see generally *Steinberg* v. *United States*, 14 F. 2d 564, 566-567 (C.A. 2d).

[20] See *Commissioner* v. *Heininger*, 320 U.S. 467, 473; *Textile Mills Corp* v. *Commissioner*, 314 U.S. 326, 338; *Lilly* v. *Commissioner*, 188 F. 2d 269 (C.A. 4th); certiorari granted October 8, 1951 (No. 158, this Term).

II

There Was No Prejudicial Error in the Charge to the Jury With Respect to Any Question Raised by the Petition for Certiorari

A. *The failure to grant petitioner's request to charge No. 29 was not prejudicial*

If, as we argue in part I, *supra*, pp. 18-40, extorted money is income, there was basically but one factual issue for the jury on the question whether the $250,000 petitioner admittedly received and did not report was income.[21] That issue, to which virtually the entire proof of both the petitioner and the United States was directed, was whether, as he contended, petitioner had the legal right to the money he received from Reinfeld because it derived from an interest in stock in Browne Vintners or whether, as the Government contended, he had no legal right to any money from Reinfeld, but obtained it through the assertion of a false claim and by threats.

Despite the fact that this was the only issue relating to whether the $250,000 was income as

[21] The other elements of the offense defined by Section 145 (b) in addition to unreported income, (1) an affirmative attempt to evade or defeat, and (2) wilfulness (*Spies* v. *United States*, 317 U.S. 492; *United States* v. *Schenck*, 126 F. 2d 702 (C.A. 2d); *Tinkoff* v. *United States*, 86 F. 2d 868 (C.A. 7th), certiorari denied, 301 U.S. 689; *Gleckman* v. *United States*, 80 F. 2d 394 (C.A. 8th), certiorari denied, 297 U.S. 709; *United States* v. *Miro*, 60 F. 2d 58 (C.A. 2d)), were without question properly charged (R. 922, 930) nor is any question raised of sufficiency of the evidence to support the verdict.

disclosed by the petitioner's opening statement, the evidence and the summation, petitioner asserts prejudicial error (Br. 36-39) in the trial court's refusal to charge the second sentence of his request No. 29. The second sentence of this request to charge [22] (R. 949) was "Even if you believe Rutkin made threats to Reinfeld and that these threats produced the money, if the money was in payment of Rutkin's interest in the Browne-Vintners stock, he should be acquitted." Petitioner contends that the refusal to make this charge was prejudicial error because without the substance of that charge the jury would reason on the basis of the instructions that (Pet. 18) "(1) threats mean extortion, (2) extortion results in taxable income not reported, (3) petitioner must be found guilty."

1. The short answer to this syllogism is that the major premise is false. There was no charge that "threats mean extortion." Petitioner, in a more objective moment, stated in his petition to this Court (p. 5) that the case went to the jury under instructions that petitioner should be found guilty if it believed the Government's contention which was in petitioner's own language that (Pet. 5) (1) "petitioner had no claim whatsoever in the proceeds of the sale of the Browne-Vintners

[22] It is not clear whether petitioner also contends that error resulted from failure to charge the first sentence of request No. 29, but, as pointed out, *infra*, p. 43, there can be no question that the substance of the first sentence (R. 949) was in fact given (R. 930).

stock;" (2) "his assertion of such claim was to his knowledge without any basis in fact * * *", and (3) "petitioner extorted the $250,000 from Reinfeld by threats to kill Reinfeld or his family * * *." Thus, by petitioner's own statement to this Court (Pet. 8), contrary to his present contention, the jury was instructed to find petitioner guilty only if it found that threats were made, and that petitioner had no right to the money.

Nor is there any question that petitioner's understanding of the issues and of the instructions as related in the petition (pp. 4-5) is correct. The court charged the jury *inter alia* that (R. 930)—

> Rutkin says that $250,000 was a final settlement of his claim in Browne Vintners, and if that is so—and the government does not contend that the capital gains tax was not paid—he would not be obliged to report that income.

It is apparent that by this statement the court accurately charged the petitioner's contention in language substantially similar to the first sentence of the request to charge No. 29. The next statement of the court's charge, reflecting the Government's position based on Reinfeld's testimony, was that (R. 930) "But Reinfeld says no, 'that was the result of extortion. He got that money out of me by threatening me and my family' * * *." Thus read in context, the charge clearly reflected petitioner's position that if it were the fact that he

had legal right to the $250,000 he was entitled to an acquittal, and, also, the Government's position that Reinfeld denied petitioner's legal right derived from an interest in Browne-Vintners but asserted that petitioner received the money by extortion carried out by threats.

No fair reading of the charge leaves any room for the conclusion that the jury was instructed to find petitioner guilty if he had a right to the money but used threats to collect it. The court's use of the word "extortion" was at all times in contradistinction of a legal right to the money. This is confirmed two sentences later by the further charge (R. 930), "If that money was *extorted and was paid as a result of threats*, then it was taxable income and Rutkin was under the duty of reporting that tax." (Italics supplied.)

2. But even assuming a latent ambiguity may be read into the court's charge considered as it appears from the cold printed page, it is entirely dissipated when considered, as it should be, in the context of the entire trial. "In reviewing criminal cases, it is particularly important for appellate courts to re-live the whole trial imaginatively and not to extract from episodes in isolation abstract questions of evidence and procedure." *Johnson* v. *United States*, 318 U.S. 189, 202 (Mr. Justice Frankfurter's concurring opinion); see also *United States* v. *Stilson*, 254 Fed. 120, 125 (E. D.

Pa.), affirmed on other grounds, 250 U.S. 583.[23] As previously stated the record established that there was no testimony of any kind that petitioner had the right to the money but used threats to collect it. The entire evidence was directed to proving or disproving right to the money on the one hand and no right, but merely threats, on the other.

Equally significant, neither the petitioner's opening statement[24] nor his summation[25] despite their great detail even remotely suggest as an alternative possibility that petitioner may have used threats to collect money rightfully his. Indeed the statement of petitioner's experienced trial attor-

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[23] The district court there stated (p. 125):

> With respect to the charge of the court, this observation is to be made: Every charge to the jury, which is a real charge, and not merely a colorless statement of the law and of the issues of fact involved, ought to reflect the real issue arising out of the evidence, and also as presented in the arguments addressed to the jury. It can never be rightly interpreted unless it is read in the atmosphere of the trial. If the parties, in presenting their cause, strip it of all formalities and technical distinctions, and get right down to the marrow of the case, and to a discussion of the substantial questions involved, it is not only helpful to the jury, but inevitable, that the charge should reflect the same spirit. There can never be applied to a charge under such circumstances the canons of criticism to which a treatise on the law of the case could properly be subjected. . . .

[24] Petitioner's opening statement was not a part of the record in the Court of Appeals, but a copy certified by the Clerk of the District Court is on file with the Clerk of this Court.

[25] The summations of both sides certified by the Clerk of the District Court have also been lodged with the Clerk of this Court.

ney almost at the outset of his two-hour summation was (Tr. 1452-6):

> Now, by saying that in his opening the District Attorney has narrowed the issue here very closely, very narrowly, *and so we can confine ourselves to that issue;* that is the issue. Did Rutkin receive $230,000 from Reinfeld *solely* as a result of threats. * * * (Italics supplied.)

3. There is yet another reason for rejecting petitioner's position. Rule 30, Federal Rules of Criminal Procedure, states:

> No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. * * *

Immediately after the trial judge completed the charge he stated in full compliance with the directive of Rule 30 (R. 935):

> The Court: I have tried only to give the general principles which are included in your requests to charge. The request to state the evidence I refuse to state in the manner requested except as I have covered it now. Hav [sic] you anything else to suggest?

The record (p. 935) then shows that despite the suggestion of petitioner's attorney that "exceptions for the record" be taken after the jury re-

tired, the court insisted, as Rule 30 requires, on hearing the objections at that point.

There followed the statement of a number of objections to the charge which the court corrected in the presence of the jury and apparently to counsel's satisfaction. The only reference to that part of the charge defining income was (R. 936): "I except to that part of your Honor's charge which says 'If the money was extorted it was taxable', purely on the legal proposition, of course." Counsel was plainly referring to the legal question in the case discussed in part I, *supra*, whether extorted funds are income, and was not objecting to the court's charge on the ground that the jury might believe that extortion encompassed the forceful taking of one's own money. Petitioner states as much at the beginning of his brief. Under the heading, "Is money secured by extortion taxable income * * *," there appears the following (Br. 28):

> By motions for judgment of acquittal (R315, R914, R954), *and by exceptions to the charge* (R936), trial counsel for petitioner promptly and clearly made known to the trial Court the contention that the income which is the subject of this indictment was not taxable under the decision of this Court in *Commissioner* v. *Wilcox*, 327 U.S. 404. The trial Court ruled that the *Wilcox* case was not applicable and denied the motions (R321, R322, R915, R916, R956). [Italics supplied.]

Moreover the exception shows that petitioner's attorney himself used the term extortion in the presence of the jury, as he had throughout the trial, in the same sense that the court used the term in the charge—as an unlawful taking of money or property not one's own by threats of violence.

Defense counsel expressly took exception to the court's refusal to charge requests Nos. 21 and 22 after which counsel thanked the court and the jury was given the case. (R. 937.) No specific exception was taken to the refusal to make charge No. 29 nor any of the other forty-five requests to charge except as already indicated, nor was charge No. 29 referred to in any manner.

Rule 30, which derives from Rule 51,[26] Federal Rules of Civil Procedure, has as its purpose to inform the trial judge of specific errors so that he may have an opportunity to correct them. *Palmer* v. *Hoffman,* 318 U.S. 109, 119-120; *Pennsylvania R. R. Co.* v. *Minds,* 250 U. S. 368, 372-375; *Beaver* v. *Taylor,* 93 U.S. 46, 55; *Lincoln* v. *Claflin,* 7 Wall. 132, 139; *Phelps* v. *Mayer,* 15 How. 160. This rule is dictated by public policy. It prevents new trials and unnecessary expense resulting from efforts to entrap the trial court with a lengthy list of requests to charge, perhaps technically correct but not in fact pressed. See generally Housel & Walser, *Defending and Prosecuting Federal*

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[26] Note to the rule prepared by the Advisory Committee appointed by this Court.

Criminal Cases (2d ed., 1946), Secs. 512, 519; 5 Moore's *Federal Practice* (2d ed., 1951), par. 51.04. Under the circumstances of this case there should be no question that petitioner, having failed to comply with the rule, should not be allowed to predicate error on his own failure, especially since on assumptions most favorable to petitioner the point was at best of doubtful substance.

B. The trial court submitted to the jury, under proper instructions, all contested questions of fact necessary to determine whether petitioner had in ome

1. In point four of his brief (p. 36) petitioner asks the question, "May a Court of Appeals properly affirm a conviction upon a new finding of fact, when the trial jury was entirely uninstructed on the law to be applied to such finding?" Although the discussion is intertwined with unrelated issues (Br. 36-40), it appears that petitioner's complaint is that the Court of Appeals affirmed the conviction on the ground that (Br. 39) "petitioner had received the money with a 'semblance of a bona fide legal or equitable claim' " but that this theory was not presented to the jury.

The short answer to this contention is that our position was at all stages of the trial,[27] and still is—

[27] Petitioner quotes (Br. 28-29) the trial court's understanding, as of the close of the Government's case, of our position to this effect.

as pointed out in detail in part I, *supra*—that extorted funds are income.[28] Our position at no point turns on such enigmatic phrases as "semblance of a bona fide claim of right." See part I, *supra*.[29]

As explained *supra*, p. 41, the case went to the jury on instructions that petitioner could be convicted if the $250,000 was extorted. This was the only instruction necessary on the income issue. Although, as we have argued, extorted money is income because the petitioner claimed of right,

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[28] It is immaterial if the court agrees with our position as to why the petitioner had income that the Court of Appeals reached the correct result by a different analysis. We do not wish to suggest, however, that the Court of Appeals' analysis was deficient as measured by the charge. It is plain that by "semblance of a bona fide claim of right" the court merely meant that, although false, petitioner asserted a colorable claim. (R. 997.) Since both parties agreed that Rutkin claimed the money as his, if as the jury found it was not an honest claim, it must have concluded that it was a spurious one. Instructions were neither asked for nor were necessary on a point not controverted. Accordingly, a new trial is not required should the Court approve the reasoning of the Court of Appeals.

[29] Petitioner also contends (Br. 40) that the jury was not properly charged on the element of wilfulness if the Court of Appeals' hypothesis is accepted that petitioner had income because he had a semblance of a bona fide claim of right. Petitioner's position is based on his assumption (p. 40) that "Any semblance of a bona fide claim of right * * * could arise only from his having had, in his own mind at least, a right to a derivative share of the proceeds of the sale of the Browne-Vintners Co., Inc." But the Court of Appeals did not use the phrase in petitioner's subjective sense (see footnote 28, *supra*), and in any event, as shown, the Government has at all times contended that "claim of right" is the objective manifestation of an intention to hold the money as one's own regardless of subjective honesty or dishonesty. For reasons already stated in detail there can be no question that the charge properly reflected our theory.

there was no "claim of right" issue for the jury. For once it was determined, as the jury did determine, that petitioner in fact had no right to the money but secured it solely by threats, the undisputed circumstances of this case permit the legal conclusion that petitioner claimed of right—i.e., adversely. No question was raised nor could be raised on the basis of any evidence presented that petitioner did not hold adversely to Reinfeld. An instruction with reference to claim of right in the *North American* sense with which we use it, would have served no useful purpose and might very well have confused the jury in the context of the particular factual controversy that existed.[30]

III

Petitioner's Points Six to Nine, Inclusive, Were Not Presented in the Petition and Are Accordingly Not Open to Him Now, but in Any Event They Are Without Merit

In parts I and II of this Argument, *supra,* we have discussed every question raised by the petition and the brief in support of the petition. In part I, we have discussed the first four "Questions Presented" in the petition (pp. 5-6), all relating to whether extorted money is income. In part II, we have discussed the fifth question of the

[30] Just as courts have mistakenly but understandably confused claim of right with an actual legal or equitable right, it should be expected that a jury instructed to find petitioner innocent if he had a right but to find him guilty if he in fact had no right, knew that he had none but claimed of right, would be hopelessly confused.

petition which, as disclosed by the brief in support of the petition (pp. 16-19), related to petitioner's request to charge No. 29 and the contention that the jury was otherwise not properly instructed on the income issue.

Despite the presentation of only those issues in his petition, petitioner devotes twenty-four pages of his brief (44-65) to the argument of four additional questions as follows:

> 1. The trial court committed prejudicial error in charging the "false in one, false in all" maxim. (Br. 44-54.)
>
> 2. The trial court's charge erroneously impaired the petitioner's testimony. (Br. 54-59.)
>
> 3. The trial court erred in impugning the testimony of important witnesses for the defense. (Br. 59-61.)
>
> 4. The charge of the trial court was argumentative and one-sided. (Br. 40-43, 61-65.)

Under the rules and decisions of this Court, it is plain that certiorari was only granted to review questions which the petition disclosed, and only those questions are to be considered. Rule 38, par. 2, Rules of this Court; *General Pictures Co.* v. *Electric Co.*, 304 U.S. 175, 177-178, 179; *Nat. Licorice Co.* v. *Labor Board*, 309 U.S. 350, 357; *Connecticut Ry. Co.* v. *Palmer*, 305 U.S. 493, 496-497; *Johnson* v. *Manhattan Ry. Co.*, 289 U.S. 479, 494.

Both because of the Court's firmly entrenched practice and the utter lack of merit in these addi-

tional contentions, we believe that no useful purpose would be served in a detailed treatment of them. Moreover, since they are in any event fully and ably discussed in the opinion of the Court of Appeals (R. 1001-1007), additional discussion here would be unduly repetitious.

CONCLUSION

The decision of the Court of Appeals is correct and should be affirmed.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.
ELLIS N. SLACK,
Acting Assistant Attorney General.
LEE A. JACKSON,
IRVING I. AXELRAD,
Special Assistants to the Attorney General.

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